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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of the Commission's
Rules to Provide Channel
Exclusivity to Qualified
Private Paging System
at 929-930 MHz

)
)
) PR Docket No. 93-35
) RM-7986
)
)

To: The Commission

**REPLY COMMENTS
OF
PAGING NETWORK, INC.**

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Dated: May 21, 1993

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SUMMARY

Paging Network, Inc. ("PageNet") submits that the most important challenge facing the Commission in this proceeding is to craft rules which deter the threat of speculative abuses and inappropriate gamesmanship, and which increase licensees' incentives to maximize use of the spectrum near-term. The goal of any regulatory scheme should be to provide service to end-users, not to protect individual competitors. Strengthening the Commission's proposals recognizes that the public will best be served where carriers have incentives to formulate concrete business plans and load their systems in order to earn a return on their investment, thus expediting service to the public.

Consequently, PageNet firmly believes that the Commission must fortify its proposals to include construction requirements which demand significant investment and which more realistically reflect the normal growth of paging systems. Specifically, as detailed in its Comments, PageNet urges the Commission to adopt rules which require nationwide licensees to operate transmitters in most RBOC territories, to curtail the three year "slow growth" period for regional systems to twelve months and for national systems to eighteen months, and to require that applicants build what they propose or forfeit exclusivity entirely. PageNet also strongly believes that the Commission should establish some type of

loading requirement, where carriers are obligated to serve a minimum number of subscribers, before exclusivity is attained.

In reflecting further on the Commission's exclusivity proposal, PageNet has also determined that the Commission and the industry face an extremely difficult transition period from channel sharing to earned exclusivity. While exclusivity is a worthy concept in theory, the "devil is in the details." The Commission, must, therefore, consider more specifically how the grandfathering of existing systems will work, particularly how and whether sharing on channels where national, regional and/or local licensees have earned exclusivity will continue in limited instances.

Finally, those few commenters who voiced opposition to the Commission's proposal support exclusivity in principle, but raise concerns about eliminating the distinctions between common and private carrier paging, and urge the Commission to adopt an integrated approach to PCP and RCC regulation. PageNet submits that the Commission is grappling with this issue on a wider scale, and that a broad review of common versus private carrier regulation is beyond the scope of this proceeding.

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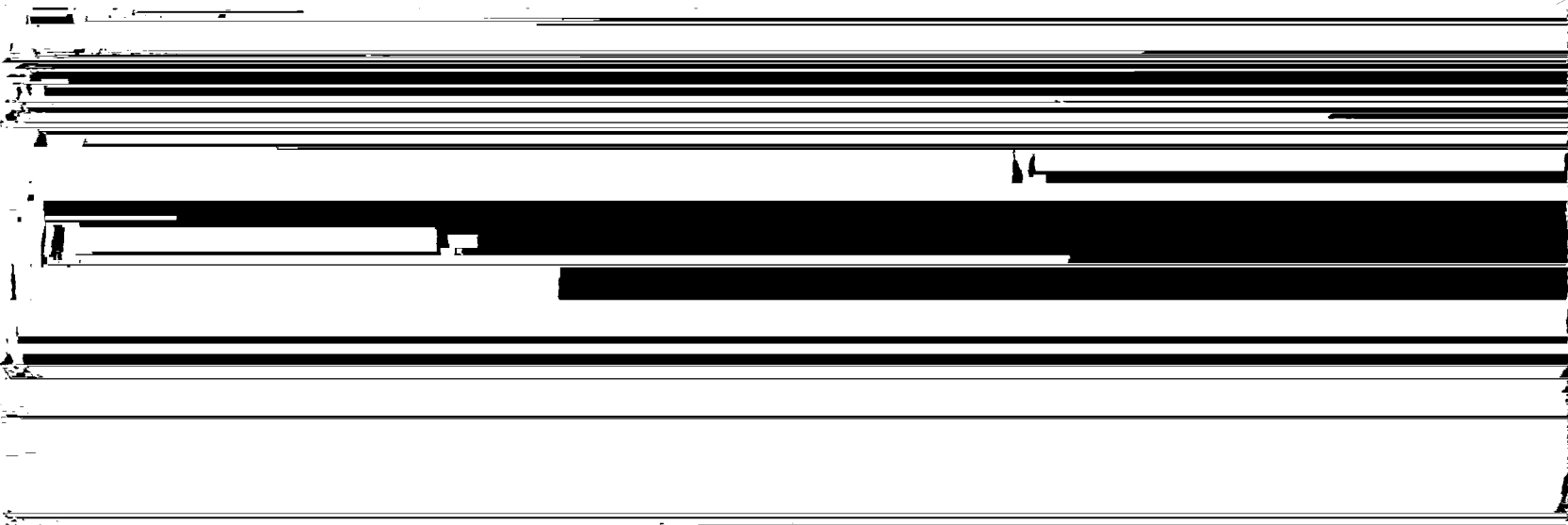
REPLY COMMENTS OF PAGING NETWORK, INC.

Paging Network, Inc. ("PageNet"), by its attorneys
and pursuant to Section 1.415 of the Commission's Rules, 47
C.F.R. § 1.415, hereby submits its reply to the comments filed
in the above-captioned proceeding. PageNet concurs with the
majority of commenters who applaud the Commission's plan to
grant channel exclusivity to qualified local, regional, and

However nice the concept of earned exclusivity is in theory, however, the record, and further reflection, demonstrates that the Commission and the industry face difficult choices in attempting to accommodate national, regional, and local exclusivity. Some amount of sharing between national, regional, and local systems may need to continue even on those channels on which licensees earn exclusivity if the public is to be served.

I. INTRODUCTION

Eighteen parties filed comments in this proceeding, the overwhelming majority supporting the Commission's proposal to provide for channel exclusivity at 929-930 MHz. Most supporting commenters also offer suggestions as to how the Commission should alter its proposed rules concerning exclusivity for nationwide, regional and local systems, particularly as concerns the construction and operation of these systems, frequency coordination, and the grandfathering and expansion of existing systems. In evaluating these various proposals, PageNet cautions the Commission to bear



PageNet submits that the most important challenge facing the Commission in this proceeding is to craft rules which deter the threat of speculative abuses and inappropriate gamesmanship, and which increase licensees' incentives to maximize use of the spectrum near-term. The goal of any regulatory scheme should be to provide service to end-users, not to protect individual competitors. Strengthening the Commission's proposals recognizes that the public will best be served where carriers have incentives to formulate concrete business plans and load their systems in order to earn a return on their investment, thus expediting service to the public.

In reflecting further on the Commission's exclusivity proposal, PageNet has also determined that the Commission and the industry face an extremely difficult transition period from channel sharing to earned exclusivity. While exclusivity is a worthy concept in theory, the "devil is in the details." The Commission, must, therefore, consider more specifically how the grandfathering of existing systems will work, particularly how and whether sharing on channels where national, regional and/or local licensees have earned exclusivity will continue in limited instances. PageNet offers several alternatives below.

Finally, those few commenters who voiced opposition to the Commission's proposal support exclusivity in principle, but raise concerns about eliminating the distinctions between common and private carrier paging, and urge the Commission to

adopt an integrated approach to PCP and RCC regulation. PageNet submits that the Commission is grappling with this issue on a wider scale, and that a broad review of common versus private carrier regulation is beyond the scope of this proceeding.

II. DISCUSSION

A. THE COMMISSION SHOULD ADOPT RULES WHICH PROVIDE FOR NATIONWIDE, REGIONAL, AND LOCAL EXCLUSIVITY

The majority of commenters in this proceeding agree that the Commission has made a commendable effort to adopt minimum transmitter construction requirements for local, regional, and nationwide systems that will assure a sufficient presence in a territory to justify exclusivity. The proposed minimum transmitter counts, combined with an efficiency and loading standard, reflect a level of investment and operation indicative of a serious intent to provide service to the public which warrants exclusivity. In its Comments, PageNet suggested several refinements to the Commission's proposed system configuration, and offers the following in response to proposals advanced and issues raised by other commenters in this proceeding.

1. Grandfathering of Existing Systems

PageNet believes that the Commission must adopt more specific rules concerning grandfathering of existing systems in order to control the impact grandfathering would have on

existing systems and on the ability of new systems to obtain exclusive frequencies. For example, it is unclear what solution is best where, at the outset, one carrier qualifies for nationwide exclusivity and another for local exclusivity on the same channel. In this circumstance, which PageNet understands exists to varying degrees on a number of frequencies, the Commission and the industry face difficult choices. For example, as the Commission recognizes, it could grant nationwide exclusivity to the nationwide applicant, excepting those local markets in which a licensee had established local exclusivity. However functional the local service might be, however, the national service would be impaired, resulting in a system more analogous to Swiss cheese than one capable of providing a national, ubiquitous service. Subscribers to the national service simply would not be able to obtain service in excepted local markets. PageNet submits that this scenario is untenable, and that if the Commission views this as the only option, that exclusivity as a proposal on these frequencies should fail.

The other options which PageNet has to date considered are far preferable to this first resort. Among them are a requirement that the local licensee be required to interconnect with the nationwide or regional licensee, and to terminate national or regional pages. This option would also require the Commission to impose interoperability requirements, perhaps mandating that whichever system utilized

the most efficient speeds/ baud rate would similarly need to be adopted by the other system.

Alternatively, the Commission could impose on both licensees an obligation to continue to share spectrum in the overlapping areas.¹ This proposal, too, has limitations in that one licensee could deploy inefficient technologies, taking up more than its equitable share of the channel or, as is possible when one licensee maximizes utilization of the channel, make it difficult for the other licensee to get on the channel to transmit without delays. This option, while potentially feasible, would require the Commission to mandate frequency sharing arrangements, hopefully coupled with requirements for efficient use.²

A third, perhaps more palpable, option might be to require the local licensee to immediately relocate, particularly if its system were not loaded.³ If the local

¹ In the absence of stringent interconnection and sharing obligations, sharing of regional and nationwide channels is highly inefficient because the regional and/or nationwide system may be required to share with several grandfathered local systems -- each of which may demand differing amounts of airtime and may prove to be very difficult to coordinate.

² PageNet submits that a reasonable determination needs to be made regarding percentage splits where, e.g., national/local, national/regional, etc., sharing occurs, and that each licensee be allowed to increase use up to a percentage maximum where others sharing the frequency do not have any traffic.

³ The Commission is evaluating a negotiated relocation program with regard to Personal Communications Services. See Notice of Proposed Rulemaking and Tentative Decision in Gen. Docket 90-314, ET Docket 92-100, 7 FCC Rcd 5676

Continued on following page

system were not yet built, or built but not yet serving in excess of some number of subscriber units,⁴ the licensee would have to immediately relocate to another frequency if available.⁵ The cost burden, if any, should not be solely borne by the local carrier; a cost sharing concept should be implemented. In fact, certain circumstances may warrant that the national or regional carrier pay the entire cost of relocation. If no frequencies are available, then the local licensee would be required to share with regional and/or national licensees who also earned exclusivity on this frequency.

None of the above options laid out by PageNet are perfect. PageNet has itself not yet drawn any conclusions as to which of these options is preferable. What is clear, however, is that national, regional and local systems will, in some instances, each be able to claim exclusivity on the same channels. Therefore, a mechanism must be devised which allows licensees to provide high quality service to subscribers.

Continued from previous page

at ¶ 47 (1992); see also Notice of Proposed Rulemaking in ET Docket 92-9, 7 FCC Rcd 1542 (1992).

⁴ In the absence of an efficiency/utilization ratio, PageNet believes number of units is a more appropriate loading measurement than time on a channel since a licensee could achieve utilization of a channel by repeating pages, etc.

⁵ PageNet perceives this option as operating under a priority system where, for example, national exclusivity on a channel would have priority over regional and local exclusivity, and regional exclusivity would have priority over local exclusivity.

2. Transmitter Count

As a preliminary matter, PageNet agrees with PacTel's suggestion that the Commission expressly provide that licenses and facilities of subsidiaries and commonly-controlled affiliates may be aggregated to meet the construction requirements to achieve exclusivity. As PacTel notes, many regional and nationwide licensees today hold their PCP licenses in different subsidiaries for bona fide accounting, tax, and regulatory reasons. Permitting a licensee to aggregate all of the licenses held by its subsidiaries and commonly-controlled affiliates would in no way undermine the underlying purpose of the Commission's rules, as the Commission would essentially be able to look to one operator for a demonstration of serious intent to provide service to the public.

PageNet believes that PacTel's and NABER's suggestion that disparate licensees be allowed to cooperate together and receive exclusivity in a territory should be tempered to protect groups involved in sharing as of the date of the Commission's Notice. To further extend this proposal would undermine the requirement for true investment which will serve as a safeguard against speculation and warehousing. Where carriers form a true joint venture with the attendant responsibilities and investment, however, PageNet believes that the resulting entity should be permitted to become a legitimate licensee and be able to earn exclusivity.

PageNet supports PageMart's proposal that for purposes of determining exclusivity, each frequency-agile transmitter count toward only one of the channels on which it is licensed. While preserving the requirement that carriers earn exclusivity through significant investment in 300 transmitters per frequency, this proposal gives carriers the necessary flexibility to operate their systems in the most technically efficient manner.

3. Regional Systems

As concerns regional exclusivity, the Commission has proposed that carriers receive credit for non-contiguous transmitters, provided that they are located in 12 contiguous states. PacTel observes, and PageNet concurs, however, that state boundaries are not always appropriate for defining the limits of radio paging coverage. PageNet supports, therefore, PacTel's proposal that the Commission add to its requirements for regional exclusivity the proviso that a Basic Trading Area ("BTA") encompassing counties in more than one state cannot be subdivided. For example, the Washington, D.C. metropolitan area falls within D.C., Maryland, and Virginia. If an applicant were allowed to define a region which included Maryland and D.C. but not Virginia, the commercial trading area would be subdivided, and a portion of the metropolitan area would not receive adequate coverage. It does not serve the public interest to have only portions of a common trading area covered by a regional licensee.

4. Nationwide Systems

As set forth in its Comments in this proceeding, PageNet fully supports the Commission's decision to facilitate the development of nationwide PCP systems. However, the 300 transmitter threshold which the Commission proposes must be coupled with reasonable criteria which force prompt construction, as well as geographic distribution requirements, in order to guard against speculation, warehousing and the inappropriate gamesmanship which may preclude significant coverage of all markets. PageNet's response to proposals concerning the "slow growth" of nationwide systems is set forth in Section B., infra. As concerns the geographic

also necessary to ensure that carriers actually build-out their systems to serve the public, and do not attempt to simply serve large geographic areas with a "big stick."

These service requirements are critical to avoid the type of gamesmanship which threatens the expeditious development of PCP services in response to consumer demand. Absent a geographic service requirement, a PCP licensee could build 300 transmitters in a single concentrated area of the country, be awarded nationwide frequency exclusivity, and effectively freeze out PCP operators in the remainder of the country respecting that PCP frequency. As a result, consumers would be denied truly nationwide service, valuable spectrum would lie fallow, and this carrier could choose whether to build out this year, in ten years or not at all.

Finally, PageNet strongly opposes ITA's proposal that once a nationwide licensee's applicable construction period has passed, other applicants should be permitted to be licensed to use the nationwide licensee's designated channel in areas where the channel is not being used, provided that there are no other suitable 929-930 MHz paging channels available, and that the Section 90.495 separation criteria are satisfied. If a nationwide licensee has satisfied the reasonable criteria proposed in this proceeding including prompt construction and geographic service requirements, it will have adequately demonstrated a serious intent to provide service that is truly nationwide. Consequently, this licensee should be afforded the opportunity to further expand according

to its business plan. To provide otherwise would be to negate the possibility of true nationwide service. Any decision to allow other applicants to operate on the nationwide licensee's designated channel should be at the nationwide carrier's option, whether through a management agreement or otherwise.

5. System Expansion

As concerns expansion by licensees who have justified the exclusive use of a frequency, PageNet supports PacTel's position that expansion be allowed provided that the extension of coverage does not overlap with another co-channel licensee's geographic area. For example, a local exclusive licensee could expand into adjacent areas which are not the subject of another licensee's exclusive area (either regional or local). If the local exclusive licensee is surrounded by a regional exclusive licensee, it would be prohibited from expanding without the concurrence of the regional exclusive licensee. If an exclusive licensee expands into an adjoining area in which a co-channel operator is operating on a non-exclusive basis, the non-exclusive operator would be grandfathered for continued operation, but no further licenses on the frequency would be granted to third parties.

6. Technical Considerations

The record in this proceeding supports a modification of the Commission's technical standards to conform with those adopted for competing Part 22 carriers and

to allow PCP systems to operate at up to 3500 watts, provided no harmful interference results. PageNet, PageMart, PacTel, American Paging, Metrocall, and Celpage each have documented the public interest benefits of higher power operation. Such power levels enhance the carrier's ability to construct facilities that provide service over the widest possible area utilizing the fewest number of transmission facilities, thereby reducing the cost of system construction and ultimately the cost of service to subscribers. Moreover, these rule changes would render PCP systems more competitive with Part 22 licensees.

B. THE COMMISSION'S RULES MUST FACILITATE THE PROMPT CONSTRUCTION OF SYSTEMS AND THE EXPEDITIOUS PROVISION OF SERVICE TO THE PUBLIC

PageNet submits that the most important challenge facing the Commission in this proceeding is to craft rules which deter the threat of speculative abuses and inappropriate gamesmanship, and which increase licensees' incentives to maximize use of the spectrum near-term. The goal of any regulatory scheme should be to provide service to end-users, not to protect individual competitors. Strengthening the Commission's proposals recognizes that the public will best be served where carriers have incentives to formulate concrete business plans and load their systems in order to earn a return on their investment, thus expediting service to the public.

Consequently, PageNet firmly believes that the Commission must fortify its proposals to include construction requirements which demand significant investment and which more realistically reflect the normal growth of paging systems. Specifically, as detailed in its Comments, PageNet urges the Commission to adopt rules which require nationwide licensees to operate transmitters in most RBOC territories, to curtail the three year "slow growth" period to twelve months for regional and eighteen months for nationwide systems, and to require that applicants build what they propose or forfeit exclusivity entirely. PageNet also strongly believes that the Commission should establish some type of loading requirement, where carriers are obligated to serve a minimum number of subscribers, before exclusivity is attained.

time to build, according to their needs, not the needs of the end-user.

In this regard, PageNet concurs with MTel's belief that transmitters counted toward exclusivity must be part of an integrated, operational system providing service to the public and that licensees should be required to construct nationwide systems consistent with prompt build-out schedules provided by the Commission. Further, PageNet strongly believes that a lengthy and unrealistic slow-growth period provides ample opportunities for speculation and spectrum warehousing without provision of service.

Most of the commenters in this proceeding agree that an eight-month construction period is reasonable for local systems. Arch Communications Group, Inc. ("Arch"), for example, acknowledges that the Commission's requirements regarding eight-month construction deadlines, to which operators must judiciously adhere, will prevent unwanted warehousing of frequencies. Several commenters in this proceeding, however, either support the Commission's proposed three year slow growth period or propose an extended slow growth period for systems with more than 30 transmitters. PageNet believes that the public interest demands more of licensees desiring exclusivity, and disagrees with those commenters who would accept the three year slow growth period proposed in the Commission's Notice, as opposed to more realistic construction periods. The more liberal construction criteria would allow carriers to proceed at an unnecessary and

unreasonably slow pace, thus removing valuable frequencies from the pool without concomitant benefit to the public.

Those commenters who advocate such an extended "slow growth" period are apparently advancing their own interests and are

exclusivity. Further, imposing this type of requirement will create a significant disincentive to applicants who intend to "go for broke," unsure as to whether they will be able to build the system they propose but tying up spectrum by applying for national exclusivity because they have nothing to lose by failing to live up to their commitment, but everything to gain by assuming the risk. Given this scenario, the Commission will be deluged with applications for nationwide systems.

Also consistent with its position that the Commission should adopt rules which facilitate prompt construction and provision of service to the public, PageNet agrees with PacTel's assertion that the Commission should require construction within eight months (or a longer period for slow growth applicants) of a sufficient number of transmitters to meet the exclusivity standards regardless of whether modification applications are filed. Extending construction deadlines as a result of modifications simply provides yet another opportunity for carriers to engage in an inappropriate means of delaying construction and, subsequently, service to end-users.

PacTel proposes that the Commission incorporate into its construction requirements the use of forfeiture bonds as a means to ensure licensee compliance. PageNet does not agree that forfeiture bonds are an adequate means of assuring the sincerity of an applicant. As a preliminary matter, it is unclear whether the Commission has the jurisdiction to impose

a forfeiture for failure to construct any facility required to meet the minimum number of transmitters. Regardless, PageNet does not believe that the use of a forfeiture bond would serve to promote timely construction and provision of service to the public. Clearly, there is some forfeiture amount that a licensee would be willing to pay in order to be able to "roll the dice" on the chance that they will in fact be able to build out the system they propose. Where carriers are not able to construct what they propose, end-users lose; those sites which remain unconstructed represent available spectrum which has been removed from the market for the extent of the slow growth period -- spectrum which might otherwise have been quickly and efficiently utilized to satisfy consumer needs. No forfeiture amount can adequately remedy that disservice to the public interest.

Several commenters argue that the proposed rules give an unfair advantage to new applicants presumably because, as PageNet understands their comments, existing licensees do not have the same time to "grow into" exclusivity as new applicants.⁷ These commenters propose that the date by which licensees on a channel can achieve exclusivity should be calculated from the date of adoption or release of the rules on channel exclusivity and not the date the license is granted to any particular competitor. Those eligible to earn exclusivity would be determined by constructed facilities in

⁷ See Comments of Metagram America, Inc., filed May 6, 1993 at 16.

operation at the end of this one year period. PageNet does not, however, agree with these commenters that the Commission's rules as proposed create an uneven competitive field. Those entities filing applications, regardless of their timing, have indicated their willingness and ability to construct and operate these facilities within the prescribed time frame, and should be permitted to do so should they satisfy their obligations under the Commission's rules, without penalty as concerns exclusivity. Clearly, the Commission's goal in this regard should again be the expeditious provision of service to the public -- carriers should not be penalized for facilitating this goal. Similarly, to the extent that MTel is arguing that smaller operators should be protected from marketplace risks even if they lack sufficient capital to grow with rising end-user demand, its opposition runs counter to the basic Commission assumption in favor of competition and should be rejected summarily. By restricting exclusivity only to serious ventures with the attendant requirements of capital investment and actual system operation, the Commission can ensure that earned exclusivity is awarded to operators whose paging systems will not unfairly preempt smaller operations.

In its Notice, the Commission adopted a freeze on applications because of the Commission's view that these proposals may have an impact on future availability of 900 MHz paging channels. Subsequently, the Commission lifted the freeze citing the harsh impact the freeze had on existing

licensees. PageNet supported the Commission's action to lift the freeze, but acknowledges that the Commission may be concerned about the possibility of speculation during the pendency of this rulemaking proceeding. PacTel offers one alternative to thwart speculation while allowing existing licensees to carry out their business plans -- prohibit NABER from coordinating applicants onto a frequency currently licensed to a third party. PageNet agrees that this restriction would prevent the possibility for speculation by

rights. This type of problem may result because, consistent with current FCC practice, priority of applications would continue to be based on the time of filing with the Commission, not filing with the coordinator. Moreover, as Celpage indicates, after several years' experience in this field, NABER has compiled a PCP database which would be extremely difficult to duplicate. This database would also be invaluable in assigning exclusive frequencies under the FCC's proposed rules, and in grandfathering existing systems. Neither ITA nor APCP has any experience serving the private carrier paging industry, and neither has knowledge of the industry's particular requirements. Further, the obligation imposed on the three coordinators to work together to ensure that their recommendations do not conflict with one another's, and to keep their shared database current, would inevitably result in higher coordination fees to applicants, with a lower quality of service.

NABER's coordination process has worked well and will continue to work well; exclusivity poses no variables which merit a change in the existing system. The existing process has resulted in efficiency, certainty, and the prevention of confusion. PageNet urges the Commission, therefore, to retain NABER as the sole PCP coordinator.